80-722

No. .....

Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

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October 24, 1980

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

Whether under the Due Process Clause of the Fourteenth Amendment a California court may assert in personam jurisdiction over a nonresident Canadian defendant on a cause of action arising in Canada where that defendant initiated no "minimum contact" in California relating to the cause of action and where that defendant's only business contacts with California were advertising and accepting in Canada reservations and deposits for Canadian ski resort accommodations.

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No. .....

In the
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OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

VS.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Petition for Writ of Certiorari to the Superior Court of California in and for the County of Alameda

---

The petitioner, Canadian Mountain Holidays, Ltd., respectfully prays that a writ of certiorari issue to review the order of the Superior Court of California in and for the County of Alameda entered in this proceeding on May 5, 1980.

OPINION BELOW

No opinion was rendered by the court below.

JURISDICTION

The order of the Superior Court of the State of California in and for the County of Alameda was entered on May 5, 1980. A timely petition for writ of mandate to review that order was summarily denied by the Court of Appeal of California, First Appellate District, on June 24, 1980. A timely petition for hearing in the Supreme Court of California was summarily denied on July 30, 1980, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure:

> Section 410.10 Jurisdiction Exercisable
>
> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States.

STATEMENT OF THE CASE

1. Summary of Material Facts.

Petitioner, Canadian Mountain Holidays, Ltd. (hereinafter "CMH") is a Canadian business headquartered in

Banff, Alberta, which provides "helicopter skiing" services to the public in the wilderness mountains of British Columbia, Canada. CMH's services are limited to providing guides, local helicopter transportation, food and lodging to skiers. Its business activities are limited geographically to the Rocky Mountain region of Canada, although its patrons travel to that location from all over the world. Its business is analogous to that of a localized resort.

CMH has no assets, offices, agents or business activities in the United States. Its "contacts" within the United States are limited to (1) limited advertising of its services in national magazines of general circulation, (2) distribution of informational brochures and films to persons requesting and (3) accepting reservations and deposits at its offices in Canada and related correspondence with patrons, directly or through nonexclusive travel agents.

Ian Buist, plaintiff's decedent spouse, was a California resident who had skied in prior years with CMH in Canada. On his own initiative (and not in response to any advertising or solicitation from CMH), he called a friend, Tom Gerrity, in Boston, Massachusetts and suggested that they reserve space in a subsequent CMH Canadian skiing excursion. Mr. Gerrity telephoned from Boston to CMH in Alberta on February 28, 1978, and requested a reservation for both men for a CMH program in January, 1979.

In response to Mr. Gerrity's request, CMH sent an application form and information to Mr. Buist in California. Mr. Buist returned his application form and subsequently sent his reservation deposit to CMH in Canada to hold his place in the group. He arranged his travel to Canada independently of CMH. All relevant "acts" of CMH occurred in Canada. No travel agents were involved in arranging Mr. Buist's accommodations with CMH.

Mr. Buist arrived for the CMH program at Cariboo Lodge in the Canadian Rocky Mountains, British Columbia, on January 20, 1979. While skiing alone nearby in the Canadian Rocky Mountains several days later, he fell into a "tree well" and died as a result of suffocation.

On January 22, 1980, Wendy Paige Buist, widow of Ian Buist, filed a wrongful death action against CMH in the Superior Court of California in and for the County of Alameda. She served the suit by mail upon CMH in Canada.

2. Presentation of Federal Question.

CMH appeared specially in the Superior Court of California in and for the County of Alameda and moved to quash service of process upon it for lack of in personam jurisdiction pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. CMH also moved the court to stay the action under forum non conveniens. Both motions were denied by the court on May 5, 1980 without a written opinion. CMH timely petitioned the California Court of Appeal, First Appellate District, for a writ of mandate to compel quashing of service, which petition was summarily denied without hearing on June 24, 1980. CMH timely petitioned to the California Supreme Court for a hearing, which petition was summarily denied on July 30, 1980.

3. Reason for Petition being Addressed to Superior Court of California.

This petition is addressed to the Superior Court of California in and for the County of Alameda because its order denying petitioner's motion to quash service of process is final and not reviewable by appeal or otherwise. Under California law, where a defendant moves unsuccessfully to quash service of process for lack of in personam jurisdic-

tion and then elects to defend the action on its merits, defendant's general appearance waives the right to have the jurisdictional matters reviewed on appeal. *McCorkle v. Los Angeles,* 70 Cal.2d 252, 256, 74 Cal.Rptr. 389, 449 P.2d 453 (1969).

The summary denials of the Court of Appeal of California and the Supreme Court of California to review the order of the Superior Court do not necessarily constitute decisions on the merits of this action. *McDonough v. Garrison,* 68 Cal.App.2d 318, 327, 156 P.2d 983 (1945). The order of the trial court constitutes a "final judgment" under California law which was rendered "by the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257. *Grovey v. Townsend,* 295 U.S. 45, 47 (1935).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts as to the Proper Exercise of In Personam Jurisdiction over Nonresident Defendants Commercially Engaged in Providing Services Outside of the Forum State.

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko v. Superior Court,* 436 U.S. 84, 91 (1978). A judgment rendered in violation of due process is void and unenforceable in the forum state and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff,* 95 U.S. 714, 732-33 (1878). CMH contends that its rights under the Due Process Clause have been violated because the respondent Superior Court lacks in personam jurisdiction over it under the "minimum contacts" test of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and its progeny.

The federal due process standard is applicable to the California state courts. California Code of Civil Procedure section 410.10 provides that,

> "A Court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

See *Kulko v. Superior Court, supra,* at 89. Under the "minimum contacts" test a nonresident defendant's contacts with the forum state must be sufficient that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, supra,* at 316, quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940).

The decision of the Superior Court, though lacking a formal written opinion, necessarily held that CMH had sufficient "minimum contacts" with California to enable California state courts constitutionally to assert jurisdiction over CMH. That conclusion is erroneous and in direct conflict with all established case law.

A. PETITIONER LACKED MINIMUM CONTACTS WITH CALIFORNIA THAT RELATE TO THIS ACTION.

The only "contacts" which CMH had with California relating in any way to the present cause of action were its accepting a reservation for the Canadian skiing activity through a phone call placed from Massachusetts to Banff, Alberta, and subsequently, its corresponding with plaintiff's decedent to secure in Canada his completed application and reservation deposit. Although CMH conducted limited advertising which reached California, plaintiff's decedent acknowledged in his application that he did not respond to any such promotional activity in making his reservation. [Exhibit C to Moving Papers].

The issue here is whether the unilateral activity of a California resident, in contacting a Canadian business to reserve recreational services at a Canadian location, reasonably may subject that Canadian business to personal jurisdiction in California in a cause of action arising in Canada.

This Court in *Kulko v. Superior Court, supra,* stated the rule applicable to this circumstance as follows:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State . . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum state . . ."

Id. at 436 U.S. 93-94, quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). The same rule was applied to a products liability context in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), which followed *Kulko v. Superior Court, supra,* in holding that the unilateral act of a plaintiff's taking a product into a state would not create personal jurisdiction over the foreign defendant distributor there. *World-wide Volkswagen Corp. v. Woodson, supra,* at 295-98. *I*n the present case, the unilateral act of plaintiff's decedent in reserving resort services to be performed in Canada through an international telephone call does not create California jurisdiction over the Canadian business.

The nature of a recreational resort is that it must draw patrons from a wide geographical area while conducting its business at one location. It must accept and confirm reservations by mail or telephone to function, yet it would be wholly unreasonable to say that by doing so, it subjects itself to personal jurisdiction at every location from which

its patrons came. If that were a sufficient "contact" to support jurisdiction, there would be, by definition, no limit to jurisdiction over foreign resorts.

All reported decisions considering similar contacts have found an absence of jurisdiction over the foreign resort. See *Fordyce v. Round Hill Developments, Ltd.*, 585 F.2d 30 (2d Cir. 1978) (New York resident at Jamaica hotel); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (New Jersey resident at Pennsylvania resort); *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954 (5th Cir. 1965) (Texas resident at Bahamas hotel); *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832 (2d Cir. 1958) (New York resident at Florida hotel); *Kopolowitz v. Deepdene Hotel & Tennis Club*, 464 F.Supp. 677 (S.D.N.Y. 1979) (New York resident at Bermuda resort); *Sanders v. Wiltemp Corp.*, 465 F. Supp. 71 (S.D.N.Y. 1979) (New York resident at Pennsylvania resort); *Braasch v. Vail Associates, Inc.*, 370 F.Supp. 809 (N.D.Ill. 1973) (Illinois resident at Colorado ski resort); *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 176 N.Y. Supp.2d 318 (1958) (New York resident at Florida hotel). Courts also have held that interstate correspondence and telephone communication relating to a transaction are an insufficient "minimum contact" where the relevant services are performed elsewhere. *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 454-55 (8th Cir. 1977); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 729-30 (5th Cir. 1973); *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972). The "contacts" present here reasonably cannot subject a Canadian resort to jurisdiction in California.

Even if minimum contacts were established, considerations of "fair play and substantial justice" still would mitigate against jurisdiction here. See *Kulko v. Superior*

Court, supra, 346 U.S. at 92-93. California has no interest in regulating Canadian skiing. Canadian tort law should apply in any trial. There is no possibility of multiple litigation. Nearly all discovery will have to be conducted in Canada. The British Columbia courts at Victoria are within easy geographical reach of a plaintiff residing in Northern California. No relevant factor would support the exercise of jurisdiction in California.

B. A CANADIAN DEFENDANT'S LIMITED ADVERTISING IN THE UNITED STATES AND ACCEPTANCE OF ACCOMMODATION RESERVATIONS AND DEPOSITS IN CANADA CANNOT CREATE IN PERSONAM JURISDICTION OVER IT IN CALIFORNIA UNDER THE "SUBSTANTIAL BUSINESS" TEST.

Where jurisdiction fails under the "minimum contacts" test, it may be based only upon the defendant's "systematic, continuous and extensive" conduct of unrelated business within the forum, to an extent that it would be reasonable to consider the defendant a resident of the state for purposes of any cause of action. *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 448 (1952); See 2 *Moore's Federal Practice,* section 4.25[5].

CMH's total contacts within California, consisting of advertising in national magazines of general circulation, distribution of informational brochures, occasional appearances at ski shows and acceptance in Canada of accommodations reservations and deposits from individuals and nonexclusive travel agents, do not *approach* the standards of "substantial business activity." See *Green v. Chicago, Burlington and Quincy Ry. Co.,* 205 U.S. 530 (1907); *Ratliff v. Cooper Laboratories, Inc.,* 444 F.2d 745 (4th Cir. 1971); *Seymour v. Parke, Davis and Co.,* 423 F.2d 584 (1st Cir. 1970); *Scheidt v. Young, supra,* (3rd Cir. 1968); *Turner v. Jack Tar Grand Bahama, Ltd. supra,* (5th Cir. 1965); *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.,*

265 F.2d 768 (9th Cir. 1959); *MacInnes v. Fontainebleau Hotel Corp., supra,* (2nd Cir. 1958); *Braasch v. Vail Associates, supra,* (N.D.Ill. 1973); *Fisher Governor Co. v. Superior Court of California,* 53 Cal.2d 222, 1 Cal.Rptr. 1, 347 P.2d 1 (1959). The principle was stated well in *Fisher Governor v. Superior Court of California, supra,* at 225:

> "Although a foreign corporation may have sufficient contacts with a state to justify an assumption of jurisdiction over it to enforce causes of action having no relation to its activities in the state [citations], more contacts are required for the assumption of such extensive jurisdiction than sales and sales promotion within a state by nonexclusive sales representatives [citations]." *Id.*

It was unreasonable to base jurisdiction here upon such activities where the universally-recognized rule is that they do not create in personam jurisdiction over a foreign business.

2. The Decision Below Raises Significant Recurring Issues which Necessitate Clarification By This Court.

The problem of defining what contacts with a state may support the exercise of personal jurisdiction has been addressed in several recent Supreme Court opinions. None of those opinions, however, has addressed the issue as it relates to interstate communications initiated to procure *services* outside of the forum state. The present case also does not involve any unusual jurisdictional statute or regulated industry which were major factors in this Court's decision in *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957).

In *Kulko v. Superior Court, supra,* this Court held that, in a purely personal transaction involving child support, the unilateral acts of the plaintiff in California could not

compel her former husband, a New York resident, to defend himself in California. In its opinion, however, this Court repeatedly stated that Mr. Kulko's circumstance was not commercial, and it left open the issue with respect to commercial contacts.

In *World-Wide Volkswagen Corp. v. Woodson, supra,* this Court reaffirmed *Kulko v. Superior Court* in the context of products liability, holding that the unilateral act of driving an automobile into a state would not create jurisdiction over the nonresident automobile distributor in a suit arising from an accident occurring within the forum. The Court stressed that the critical issue in such cases is whether the nonresident defendant "delivers its products into the stream of commerce . . . of the forum state." *Id.,* at 297-98, citing *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961).

This Court has not defined a standard for jurisdiction in commercial transactions outside of the products liability context, particularly those which relate to services performed outside of the forum state, where there is no analogous "stream of commerce" to consider. Such cases directly confront the issue of how much interstate communication relevant to a transaction is necessary to meet the standard of due process for the assertion of jurisdiction over a foreign business. Neither of this Court's other recent decisions, *Rush v. Savchuk,* 444 U.S. 320 (1980), nor *Shaffer v. Heitner,* 433 U.S. 186 (1977), provide any further guidance beyond general reaffirmation of the principles of "reasonableness," "fairness" and "substantial justice" enunciated in *International Shoe.*

This petition presents the opportunity for this Court to state clearly what does and does not constitute a sufficient minimum contact to support jurisdiction in an interstate

business context. Given the immense numbers of such transactions which occur daily and the proliferation of lawsuits related to such dealings, a clarification of the issue is essential through a hearing of the issues presented by this petition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Superior Court of California.

Respectfully submitted,

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OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Appendix to Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

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October 24, 1980

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

Endorsed—Filed
May 5—1980

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In the Superior Court of the State of California
in and for the County of Alameda

No. 529343-4

WENDY PAIGE BUIST, individually, and as Guardian ad Litem of CHRISTINA PAIGE BUIST, a minor,

Plaintiffs,

vs.

CANADIAN MOUNTAIN HOLIDAY, LTD.; RAYMOND WARE, et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO QUASH SERVICE OF PROCESS OR STAY ACTION UNDER DOCTRINE OF *FORUM NON CONVENIENS*

Defendants' motion for an order to quash service of process or stay action under Doctrine of *Forum Non Conveniens* came on regularly for hearing before me on this 5th day of May, 1980. Robert W. Johnson appeared as counsel for the plaintiff and Paul D. Nelson appeared as counsel for the defendants. The Court examined the affida-

vits and memorandums of points and authorities submitted in support of and in opposition to said motion, and the matter was argued and submitted.

The Court being fully advised herein, and good cause appearing therefor;

IT IS ORDERED that defendants' motion herein be and is denied and that the defendants are to answer within thirty (30) days.

Dated: May 5—1980.

DONALD P. MCCULLUM
Judge of the Superior Court

Court of Appeal of the State of California
in and for the
First Appellate District

DIVISION FOUR

Filed—June 24 1980
No. 49815
Alameda
Superior Court No. 529343-4

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST, indv. and as Guardian ad Litem of CHRISTINA PAIGE BUIST,
Real Parties in Interest.

BY THE COURT:

The petition for writ of mandate is denied.

Dated Jun 24 1980

CALDECOTT, P.J.

ORDER DUE
August 22, 1980

ORDER DENYING HEARING
After Judgment by the Court of Appeal
1st District, Division 4, Civil No. 49815

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
Filed—Jul 30 1980

CANADIAN MOUNTAIN HOLIDAYS LIMITED, Petitioner
v.
THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent;
BUIST, ETC., Real Party in Interest.

Petition for hearing DENIED.

MANUEL
Acting Chief Justice

No. 80-722

In the Supreme Court

OF THE

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CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

VS.

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Respondent,

WENDY PAIGE BUIST and CHRISTINA PAIGE BUIST,
Real Parties in Interest.

BRIEF FOR REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

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January 22, 1981

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QUESTION PRESENTED

In the view of the Real Parties in Interest, the only question presented by Petitioner in seeking certiorari is whether the Due Process Clause of the Fourteenth Amendment permits a California court to assert *in personam* jurisdiction over a Canadian defendant doing business in California in an action involving the wrongful death of a California man whose patronage had been solicited and contracted by defendant in California.

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BRIEF FOR REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW

On May 5, 1980, the Superior Court of the State of California in and for the County of Alameda denied the motion of defendant Canadian Mountain Holidays, Ltd., to quash service of process in case number 529343-4, *Wendy Paige Buist, individually and as Guardian ad Litem of Christina Page Buist, a minor, v. Canadian Mountain Holidays, Ltd.; Raymond Ware, et al.* Pursuant

to request of defendant's counsel, the Superior Court orally stated its findings as follows (Record (R) Transcript at 13):

> Well, I found that the Canadian Mountain Holidays had sufficient contacts and activities in the state of California and with the decedent as to warrant a response in these courts.

On June 24, 1980, the Court of Appeal of the State of California in and for the First Appellate District denied the petition of Canadian Mountain Holidays, Ltd., for issuance of a writ of mandate to the Superior Court. On July 30, 1980, the Supreme Court of the State of California, sitting *en banc*, denied the petition of Canadian Mountain Holidays, Ltd., for hearing on the matter. In each instance, a summary order was issued without detailed written opinion.

STATEMENT OF CASE

The Real Parties in Interest in this case are the young widow and infant daughter of the late Ian Buist, a California man who died while skiing on a tour arranged, conducted and supervised by Petitioner, Canadian Mountain Holidays, Ltd. (hereinafter referred to as CMH). Mr. Buist was on a mailing list of CMH, which sent copies of its promotional and solicitation materials to Mr. Buist's home in Oakland, Alameda County, California, as well as to the homes and offices of numerous other California people and businesses. (R. Affidavit of Hans Gmoser, President of CMH at 5-7). CMH advertises in California and presents promotional shows and films in that State. (*Id.* at 7-8).

On or about November 3, 1978, Mr. Buist entered into a contract with CMH in California by accepting CMH's offer to perform certain services for him and by issuing to CMH a signed check drawn on a California bank for the full amount of money demanded by CMH. (R. Plaintiff's Exhibits 1 and 2). As part of the services which it contracted to perform, CMH took Mr. Buist on a ski trip on January 26, 1979, in the Canadian Rocky Mountains. The CMH employee-guide who was supervising Mr. Buist's trip skiied away from Mr. Buist who, left to ski alone, fell into a hole in the snow from which he could not extricate himself. By the time CMH found Mr. Buist, he had suffocated to death.

One month after his death, Mr. Buist's daughter, Christina, was born. On or about January 22, 1980, Mrs. Buist filed a wrongful death action on behalf of herself and her child against CMH in the Superior Court of California in and for the County of Alameda. Since then, CMH has sought to relieve itself of the burden of having to answer that suit.

SUMMARY OF ARGUMENT

Petitioner does business in the State of California, but contends that it does not in an effort to avoid jurisdiction in that State. It presents the fact situation to this Court as involving nothing more than "the unilateral activity of a California resident . . . contacting a Canadian business to reserve recreational services at a Canadian location." (Petition at 7). This is not the fact situation presented in the evidence, nor that described by Petitioner's own president (R. Affidavit of Hans Gmoser), nor is

it the fact situation found by the trial court. Thus, by its petition, Petitioner is asking the Supreme Court of the United States to reweigh the facts of the case. It does this under the guise of asking for a definitive ruling as to what constitutes a sufficient minimum contact to support jurisdiction in an interstate business context (Petition at 11-12); even though this Court has consistently explained that such rigid rules are not applicable to the involved concepts of due process, reasonableness and fairness. *Kulko v. Superior Court,* 436 U.S. 84, 98 S.Ct. 1090 (1978); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945).

The appropriate standard for determining a State's jurisdiction over a non-resident defendant acting in a commercial situation is whether that defendant's commercial conduct with respect to a forum state is such that he should reasonably be rendered liable to suit in that State's courts. *Kulko v. Superior Court, supra,* 436 U.S. at 96; and *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S.Ct. 559, 567 (1980). Under this standard, the finding of the Superior Court of Alameda County, California that Petitioner's contacts with and activities in California were sufficient to warrant jurisdiction was just and proper.

ARGUMENT

I. Petitioner Is Not Entitled To The Relief Afforded By A Writ Of Certiorari

As Rule 17 of the Rules of the Supreme Court states, a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. No such rea-

sons have been evidenced in the instant petition. The merits of Petitioner's position have already been found wanting by three courts, including the Supreme Court of California. In seeking this Court's review, Petitioner does not challenge the law of the State of California, nor does it allege that it has been treated differently than other parties under the broadly written standards of jurisdiction applicable in California.[1] Instead, Petitioner challenges the factual findings of the Superior Court of Alameda County, alleging that other courts ruling on other factual situations at other times and in other places have concluded differently with respect to the existence of jurisdiction. It thus asks the Supreme Court "to state clearly what does and does not constitute a sufficient minimum contact to support jurisdiction in an interstate business context." (Petition at 11-12).

The fact is, however, that this Court has just recently addressed this very issue in *Kulko v. Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1090, 1097 (1978), wherein it specifically declined to establish any such mechanical rule:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla*, 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed.2d 1283

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[1]Section 410.10 of the California Code of Civil Procedure provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or the United States.

> (1958). We recognize that this determination is one in which few answers will be written "in black and white. The grays are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948).

The concept for which Petitioner seeks a hard and fast rule is no more susceptible of further definition than is the Constitutional standard of due process, and it is specious to seek certiorari on that ground. See *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

II. Petitioner Was Not Denied Due Process

A. The Applicable Standard

Due process requires that the defendant be subject to the personal jurisdiction of the court. *International Shoe Co. v. Washington, supra,* 326 U.S. 310, 66 S.Ct. 154. A state court may exercise jurisdiction over a nonresident defendant if there exist minimum contacts between the defendant and the forum State. *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, 66 S.Ct. at 158. In order to meet the "minimum" requirement, a defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, 66 S.Ct. at 158. Among the factors to be considered in determining the reasonableness of the defendant's relationship to the forum are the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the judicial system's interest in obtaining the most efficient resolution of controversies. *World-Wide*

Volkswagen Corporation v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 559, 564 (1980).

The Petitioner's efforts to compel this Court to issue a rigidly restrictive rule on jurisdiction fly in the face of the legal developments which have naturally and necessarily evolved over the years. See *Hanson v. Denckla,* 357 U.S. 235, 250-251, 78 S.Ct. 1228 (1958). As the Court pointed out in *McGee v. International Life Insurance Co.,* 355 U.S. 220, 222-223, 78 S.Ct. 199, 201 (1957), the march of progress has brought changes in commerce, transportation and communications such that it has become much less burdensome for a party sued to defend itself in a state where it engages in economic activity. In 1980, the Court noted in *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 292-293, 100 S.Ct. at 565, that the historical developments referenced in *McGee* have only accelerated in the twenty-three years since that decision was written.

Thus, in *World-Wide Volkswagen* it was established that the question to be asked in the due process analysis is whether "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297, 100 S.Ct. at 567. The Court resolved that question in *World-Wide Volkswagen* by declaring (444 U.S. at 297-298, 100 S.Ct. at 567):

> Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in

> other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1960).

Application of that test to the instant case clearly supports the findings of the Superior Court.

B. Jurisdiction Was Properly Found In Accordance With The Standards Applied In World-Wide Volkswagen And Kulko v. Superior Court

The sale of Petitioner's services to Californians, and to the deceased in particular, arose from Petitioner's deliberate and concerted efforts to exploit the California market and serve the California consumer. Petitioner is a commercial venture seeking to operate for a profit by selling the relatively exclusive and unique service of helicopter skiing in the Canadian Rocky Mountains.

California is, of course, not only the most populous state in Petitioner's neighboring United States, but it has nearly as many people as in all of Petitioner's native Canada. CMH admits to advertising in California.[2] It admits to

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[2]Although CMH implies in its Petition (at 9) that it advertises only in "national magazines of general circulation," the fact is that it places full-color, full page advertisements in PSA Magazine, the in-flight publication of PSA airlines, which only flies to and from points in California.

supplying California with promotional materials and mailings, and it admits to sending commercial representatives into the state. (R. Affidavit of Hans Gmoser at 5-8). Clearly, CMH expected that its product (i.e., its helicopter skiing trips) would be purchased by consumers in California. Equally clear is the fact that CMH's sale of the fatal trip to Mr. Buist was not an isolated occurrence, since it was CMH's practice "automatically" to place all customers on its mailing list in order to continue soliciting their business. (*Id.* at 8). Accordingly, inasmuch as CMH was seeking to develop additional business in California, it should have reasonably anticipated that its activities were going to make it subject to the jurisdiction of California courts. See *World-Wide Volkswagen v. Woodson, supra,* 444 U.S. at 297, 100 S.Ct. at 567.

The activities engaged in by CMH were and are continuous, systematic, and ongoing. Pursuant thereto, CMH purposely availed itself of the privilege of conducting business within California by, *inter alia,* utilizing a California company to distribute its promotional materials (R. Affidavit of Hans Gmoser at 8) and engaging in commercial transactions with California travel agents (*Id.* at 6-7). See *Buckeye Boiler v. Superior Court,* 71 Cal.2d 893, 902 (1969); and compare *Kulko v. Superior Court, supra,* 436 U.S. at 100-101, 98 S.Ct. at 1701, which found California had no jurisdiction in a child support case over a father "who derives no personal or *commercial* benefit from his child's presence in California and who lacks any other relevant contact with the state". (Emphasis added).

In its petition to this Court, CMH attempts to skirt the clear distinction enunciated in *Kulko v. Superior Court* between personal relations and commercial transactions. Rather than "[leaving] open the issue," as CMH would have it (Petition at 11), the Court in *Kulko* was careful to establish that its reasons for refusing to affirm California's jurisdiction over a non-resident father would not pertain to a non-resident such as CMH which seeks commercial benefits from solicitation of business from California residents. In denying California's jurisdiction in that one instance of family law, the Court said (436 U.S. at 96, 98 S.Ct. at 1699):

> There is no claim that appellant has visited physical injury on either property or persons within the State of California. Cf. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal domestic relations. *It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court*; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices in the state to an insured resident of the state. Cf. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957). (Emphasis added).

CMH cannot deny it purposefully derived benefits from activities relating to the State of California. After all, on Mr. Buist's fatal trip nearly two-thirds of the skiers were from California. (R. Plaintiff's Exhibit 4). Further, CMH

cannot deny that the death in question caused an effect in California. A California child is left to grow up without a father, and her mother is unable to seek employment outside the house because she cannot leave the infant alone. Compare *Kulko v. Superior Court, supra,* 436 U.S. at 100, 98 S.Ct. at 1701. Obviously, California has a recognized interest in the litigation and in having it heard in its own forum. *Neiman v. Rudolf Wolff & Co., Ltd.,* 619 F.2d 1189 (7th Cir. 1980); and see *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 91 S.Ct. 1005 (1971). Moreover, because CMH has chosen to seek out and do business with people throughout this country, the United States, too, has a noteworthy interest deserving of protection. See *Cryomedics, Inc. v. Spembly, Ltd.,* 397 F.Supp. 287, 290-292 (D.Conn. 1975). Unless jurisdiction is established over and in relation to the activities conducted by CMH in this country, that company may be left free to hide behind the border and lure Americans into a potential free-fire zone in which they unwittingly travel without protection.

Petitioner CMH has knowingly selected California as a market source in which it wishes to do business. It must be prepared to accept the liabilities as well as the benefits of that market. As Mr. Justice Marshall said in his dissent in *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 317, 100 S.Ct. at 570:

> Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit, and knowing that the activity is likely to have effects

> in other states the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.

This view was essentially shared by the majority of the Court in *World-Wide Volkswagen* when it declared (444 U.S. at 297, 100 S.Ct. at 567):

> When a corporation "purposely avails itself of the privilege of conducting activities within the forum State," *Hansen v. Denckla, supra,* at 253, 2 L.Ed. 2d 1283, 78 S.Ct. 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Moreover, CMH cannot claim ignorance of the likelihood that it was subjecting itself to jurisdiction by doing business in this country in light of the fact that this is not the first time it has been forced to defend itself in United States courts. (See, e.g., *Heinrich K. Aigner v. Bell Helicopter, Inc., Canadian Mountain Holidays, Ltd., et al.,* No. 79 C 3910, N.D. Ill. E.D., decided May 9, 1980). Thus, we submit, California jurisdiction was a risk eminently foreseeable and, apparently, acceptable to CMH when it elected to seek business in California. Petitioner cannot claim that it has been deprived of due process because one of its California transactions resulted in suit in that State.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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January 22, 1981

No. 80-722

In the Supreme Court of the United States

OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Reply Brief in Support of Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

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I. REAL PARTY IN INTEREST'S JURISDICTIONAL ARGUMENT IS PREMISED UPON FACTS INCONSISTENT WITH THE RECORD BELOW.

Real Party in Interest's statement of the "question presented" and her argument opposing this Petition are premised upon a falsehood—her claim that CMH "solicited" the recreational business of Mr. Buist. At pages two and nine of her brief she refers to Mr. Buist's having been placed on a CMH "mailing list," implying that he engaged in business with CMH in response to mail solicitation. The uncontradicted evidence was (1) that Mr. Buist was *not* on any CMH mailing list prior to his reserving space on the

subject skiing trip, and (2) that he did *not* respond to any advertisement in making the reservation and subsequent payment. Rather than debate the meaning of the evidence, Petitioner submits herewith the uncontradicted affidavit of Hans Gmoser which sets forth all relevant facts.[1]

Petitioner is not seeking a "reweighing of the evidence," but is seeking a legal ruling which is consistent with principles of due process upon uncontroverted evidence. Real Party in Interest does not contest or distinguish the many decisions cited by Petitioner which hold that there is not in personam jurisdiction under facts as disclosed by the record herein.

II. IN PERSONAM JURISDICTION OVER A FOREIGN DEFENDANT MAY NOT BE BASED UPON ECONOMIC BENEFIT DERIVED FROM FOREIGN TRANSACTIONS.

Real Party in Interest's remaining argument is that a foreign defendant which derives "economic benefit" from Canadian business dealings with Californians should be subjected to in personam jurisdiction in California solely by virtue of its having received such benefit. (R.P.I. Br. at 8 to 12). She offers no legal authority for her position, which specifically was rejected by California's own courts in *Spirits, Inc. v. Superior Court,* 104 Cal.App.3d 918, 924, 164 Cal.Rptr. 101 (1980). See also *Star Aviation, Inc. v. Superior Court,* 73 Cal.App.3d 807, 141 Cal.Rptr. 13 (1977). Implementation of such a jurisdictional standard would remove virtually *all* limitations from the exercise of personal jurisdiction in an interstate commercial context, since all business dealings presumably are intended to derive economic benefit.

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1. In Real Party in Interest's note 2 at page eight, she refers to an undated supposed advertisement in "PSA Magazine" published by PSA airlines, an interstate air carrier. No such evidence was in the record.

She attempts to bolster her position by arguing that Mr. Buist's death in Canada "caused an effect" in California in that she now is a widow. (R.P.I. Br. at 11). A similar "effect" would be present in *every* out-of-state personal injury suit, so that it reasonably could not provide a meaningful standard for jurisdiction. A similar argument was addressed and rejected by the California courts in *Kaiser Aetna v. Deal,* 86 Cal.App.3d 896, 150 Cal.Rptr. 615 (1978), absent actual intent to cause the "effect." See also *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972). If anything, respondent's arguments underscore the lack of clarity of the law in this area.

CONCLUSION

The issue presented by this Petition is whether a Canadian defendant may engage in business dealings with an American citizen in Canada without thereby being forced to litigate a resulting lawsuit in the United States. It is not so much an issue of "reasonable business expectations" as of Constitutional limitations on a State's jurisdictional power. It is a recurring issue which requires clarification by this Court. Petitioner does not seek a rigid or inflexible jurisdictional doctrine, only clear guidelines which would prevent overreaching by state courts. This Petition should be granted so that a full and fair hearing may be had on the issue.

Respectfully submitted,

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Appendix

AFFIDAVIT OF HANS GMOSER

I, HANS GMOSER, being duly sworn, depose and say as follows:

1. I am a resident of Harvey Heights, in the Province of Alberta, Canada, and have a relationship with certain companies, all of which are companies incorporated under the laws of the Province of Alberta, with head offices in Banff, Alberta, and are registered as extra-provincial companies in the Province of British Columbia, as follows:

a) President and a Director and a principal, along with my wife and Leo Grillmair, of Brisco, British Columbia, Canada, in Canadian Mountain Holidays Ltd., ("CMH Ltd.");

b) President and Director and a principal, along with CMH Ltd., Charles Barlow, Jr., and Laura Barlow, of Calgary, Alberta, John MacKenzie and Sheila MacKenzie, of Calgary, Alberta, William L. Putnum, of Springfield, Massachusetts, and Anthony Ben Walsh of New York, New York, in Bugaboo Helicopter Skiing Ltd., ("Bugaboo Heli");

c) Secretary Treasurer and Director of Heli-Skiing Cariboo Ltd. ("Heli Cariboo"), the principals of which are Bugaboo Heli and Lloyd Gallaghar of Canmore, Alberta,

d) President and Director of Radium Bugaboo Heli-Skiing Ltd. ("Radium-Heli"), the principals of which are Bugaboo Heli, and Roger K. Madson of Radium, British Columbia.

2. Bugaboo Heli, Heli-Cariboo, and Radium Heli have, for varying periods over the past 15 years, operated facilities for helicopter ski trips, from seven heli-skiing bases, in the Province of British Columbia, as follows:

a) Bugaboo-Heli:

(i) Bugaboo Lodge, owned by Bugaboo Heli, in the Bugaboo Mountains of the Purcell Range;

(ii) Bobbie Burns Camp, owned by Bugaboo Heli, approximately 14 miles north of Bugaboo Lodge, in the Purcell and North Selkirk Mountains;

(iii) Revelstoke, British Columbia, in the Monashee and North Selkirk Mountains, approximately 250 miles northwest of Calgary, Alberta;

(iv) Mica Creek, in the Monashee Mountains, approximately 70 miles northwest of Revelstoke, British Columbia;

b) Heli-Cariboo:

(i) Cariboo Lodge, owned by Heli Cariboo, in the Premier Mountains of the Cariboo Range, approximately 80 miles southwest of Jasper, Alberta;

(ii) Valemount, British Columbia, in the Cariboo Mountains, of the Premier Range, approximately 300 miles west of Edmonton, Alberta;

c) Radium Heli:

(i) Radium, British Columbia, in the Purcell Range, approximately 120 miles southwest of Calgary, Alberta.

3. CMH Ltd. has never engaged in any active business but has been and is used only as a holding company for its interest in Bugaboo Heli. It has had no dealings or activities whatever with U.S. companies, or in the U.S. Its only assets are its interest in Bugaboo Heli aforesaid, and

approximately $1,000.00 cash used to maintain its corporate registrations.

4. Bugaboo-Heli, Heli-Cariboo, and Radium Heli, operate helicopter skiing facilities from the bases set out above, separately, in the sense that they receive all the revenue, and pay all expenses relating to trips of customers skiing from their respective bases. They operate jointly, however, with respect to all matters outside the actual operations from, and at, the bases, which matters include, administration, promotion, advertising, and handling bookings, sharing the costs thereof according to revenue produced, and operating, at various times, under the names Canadian Mountain Holidays, CMH and CMH Heli-Skiing. From time to time, the name Canadian Mountain Holidays Ltd. may have been used in connection with these joint activities, for example, on the application form sent to the decedent, which will be referred to below, but the reference "Ltd." is in error, and there is, in fact, no involvement by CMH Ltd.

5. For convenience, the three companies, Bugaboo-Heli, Heli-Cariboo, and Radium Heli, acting jointly as described above, whether under the names, Canadian Mountain Holidays, CMH or CMH Heli Skiing, will be referred to as "CMH".

6. CMH have no office, nor place of business, nor assets in the United States, nor are they connected in any way with any heli-skiing or any other operations or business in the United States. Further, they have no business connections, relationships, or contacts whatever in the State of California, nor do they carry on any advertising or promotion in California except as follows:

a) they maintain a mailing list of individuals who have booked trips with them, and various travel agents, which

includes the following travel agents located in California which have actually made bookings with them:

Daman Nelson Travel
Penthouse P
3660 Wilshire Blvd.
LOS ANGELES, California 90010

Daman Nelson Travel
115 Mission Street
SAN FRANCISCO, California 94105

Daman Nelson Travel
5613 Falsom Blvd.
SACRAMENTO, California 95819

Draper World Travel
1333 Camino Del Rio South
SAN DIEGO, California 92108

Geramoni Travel
126 Post Street
Ste. 304
SAN FRANCISCO, California 94108

Hills Travel
470 Howe Avenue
SACRAMENTO, California 95825

North Shore Travel
P.O. Box 858
TAHOE CITY, California 95730

Pallisades Travel
Box 277
PACIFIC PALISADES, California 59801

Piedmont Travel
2067 Mountain Blvd.
OAKLAND, California 94611

Travel Moore
15309 Antioch Street
PACIFIC PALISADES, California 90272

World Travel
154 - 77 Ventura
SHERMAN OAKS, California 91403

Each year CMH send copies of their annual brochure to each of the individuals and travel agents on the mailing list, and, upon request, forward additional copies and/or any other promotional material requested. Exhibit "A" is a true copy of their brochure for the 1978/79 season. There are no written agreements with any of the individuals or travel agents referred to but in the event any of the travel agents refer a customer to the Company, or an individual books, and makes all arrangements for a group of more than 10 people, they would retain 10% of the price of the package. This I understand to be the common practice in the travel industry for any type of tour, be it heli-skiing or otherwise. There is no understanding between CMH and any of the individuals or travel agents that any of them have any exclusive right to book tours with CMH, nor do any of the individuals or agents have the authority to confirm bookings. All confirmations are made by CMH employees, in its office at 217 Bear Street, P.O. Box 1660, Banff, Alberta, Canada.

b) they do no direct advertising in California, nor do they advertise in any publication connected with the travel agents, but do place advertisements in several national publications which would have some circulation in the State of California, such as "Ski Magazine", "Skiing", "Powder Magazine", and "Fortune". The approximate annual cost for such advertising in the United States is in the order of $20,000.00. They also arrange each year with Target Travel Show & Displays, a division of Target Advertising, P.O. 1076, Antioch, California, for that Company to distribute CMH brochures at small ski shows and various ski shops in various parts of California. In addition to advertising, CMH each year send a representative to several States, including California, with a ski film or films, which are shown privately, that is, by invitation,

to interested individuals. The cost of this trip, with respect to California, to CMH, normally amounts to approximately $3,000.00, each year.

7. I have examined various records of the Company, which indicate the decedent, Ian Neville Peter Buist, had booked a trip with CMH on one previous occasion, at the Cariboo Lodge, February 18 - 25, 1978. He would automatically go on the CMH mailing list, as a result, but before any material had been sent to him, his reservation for 1979 was made, for the Cariboo Lodge, January 20 - 27, 1979, by a friend, Tom Gerrity, by way of a telephone call, on the 27th day of February, 1978. The call was made from Boston, Mass. and was noted by Dorothy Descheneau, in the CMH office in Banff, Alberta. Exhibit "B" is a true copy of her note relating to the call. She then forwarded the Company's standard application to the decedent, which he completed and returned, such forwarding and return being the first communication, to or from the decedent, in the State of California. Exhibit "C" is a true copy of such application as received March 11, 1978, by CMH. CMH then, in October, 1978, forwarded their standard "Request For Final Payment" Form, which was received, completed. A true copy of this form is Exhibit "D". Accompanying Exhibit "D" was the decedent's payment in the amount of $1,330.00, Canadian, which was acknowledged by CMH by letter, a true copy of which is Exhibit "E". Finally, CMH confirmed the decedent's reservation, and advised of arrangements for accommodation in Edmonton, and bus transportation from Edmonton to Valemount, a true copy of which confirmation is Exhibit "F". The decedent was picked up by bus as arranged, and transported to Valemount, and from there flown by helicopter to the Cariboo Lodge on January 20th, 1979. On January 20th, the dece-

dent, informally, met the guides employed by Heli Caribou, and on Sunday, the 21st, was put into one of several groups, and briefed on safety practices around helicopters and the use of skadi avalanche rescue beacons. He then skied with various groups and different guides January 21 - 26 inclusive.

8. Immediately following the accident in question herein, I visited the site and questioned everyone involved and believe the sequence of events to have been as follows: On the afternoon of January 26, 1979, the decedent skied with a group of 11 guests and a guide, Ray Ware, of General Delivery, Banff, Alberta, employed by Heli Cariboo. Ware was certified as an assistant guide by the Association of Canadian Mountain Guides, and was fully qualified to guide the group in question. Because of high avalanche hazard, most of the skiing that day was conducted in treed areas. All of the skiers in the group, including the decedent, were warned of the risks involved in skiing in treed areas, including the risk of falling in the depressions in the snow formed around trees. Also, the members of the group were instructed to ski at all times with one other person, known as a "buddy". The theory of this instruction was that each skier would maintain an awareness of the whereabouts of one other skier, namely, his "buddy", and the risk of anyone becoming separated from the group was thereby minimized. To further minimize the risk, the guide caused the whole group to regroup several times during each run. Approximately 3:15 p.m., about two-thirds of the way down a run known as "Cruncher", the decedent's buddy, Lee Cullen, fell. The decedent carried on ahead, possibly at the suggestion of Cullen. Cullen recovered his ski and skied down to where the whole group was waiting, but discovered the decedent had not appeared. Rescue efforts, including a

sweep of the run with skadis was immediately undertaken. At approximately 4:10 p.m., the decedent was found at the base of a tree, but he was dead.

9. The members of the group in which the decedent was skiing and those additional persons involved in the search for the decedent, and others in the employ of Heli-Cariboo who might be expected to be witnesses in this action are as follows:

Andre Paquin
10 rue Sylvan
DRUMMONDVILLE, Quebec
J2C 5R8

Mario Menard
c/o Verchare & Gautheir
Suite 1608, 1 Place Ville Marie
MONTREAL, Quebec
H3B 2B6

Don and Barbara Guild
1920 Strand
HERMOSA BEACH, California 90254

James Catlow
12313 Laurel Terrace Drive
STUDIO CITY, Ca. 91604

Fred Cooke
2600 S. Yosemite
DENVER, Colo. 80237

Michael D. London
160 Santa Rosa
SAUSALITO, Ca. 94965

Tom Gram
1 Markep Plaza
Spear St. Tower 221
SAN FRANCISCO, Ca. 94105

Robert Kelley Sr. & Robert Kelley Jr.
1475 W. Delta Drive
SAGINAW, Mich. 48603

Lee Cullen
3300 Lakeshore Drive
CHICAGO, Ill. 60657

William Kessler, M.D.
35 Hyde Lane
WESTPORT, Conn. 06880

Jim Schadt and Marcel Burrel
c/o Piedmont Travel
2067 Mountain Blvd.
OAKLAND, Ca. 94611

Ray Ware
P.O. Box 2175
545 Buffalo Street
BANFF, Alberta
TO1 OCO

Edi Bohren
Mass-Schuhel/Gysidorf
3818 Grindewald
Switzerland

Reinhold Plankensteiner
c/o Box 1660
BANFF, Alberta

10. The original of all exhibits will be available for inspection by the Court at the Hearing herein.

11. Except where indicated otherwise, all of the foregoing facts are within my personal knowledge, and if called as a witness, I could testify competently thereto.

Executed at Banff, Alberta, Canada.

HANS GMOSER
Hans Gmoser

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 18 DAY OF APRIL, A.D. 1980.

A NOTARY PUBLIC in and for the
Province of Alberta.
DONALD I. MACLEOD
DONALD I. MACLEOD

CERTIFICATE OF SERVICE

I hereby certify that on this eighteenth day of February, 1981, three copies of the Reply Brief in Support of Petition for Writ of Certiorari were mailed, postage prepaid, to the Superior Court of California, County of Alameda, 1225 Fallon Street, Oakland, California 94612, Respondent herein, and to Thomas G. Smith, Law Offices of Gerald C. Sterns, 490 Pacific Avenue, San Francisco, California 94133, counsel for Real Party in Interest. I further certify that all parties required to be served have been served.

BARRY L. BUNSHOFT
100 Bush Street
San Francisco, California 94104
Counsel for Petitioner